UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:

Ahmad Khazaei,	Case No. 03-59597-PJS
	Chapter 13
Debtor. /	Hon. Phillip J. Shefferly

OPINION SUSTAINING DEBTOR'S OBJECTION AND DISALLOWING CLAIM OF ALIREZA NIKOUMANESH

I.

This matter is before the Court upon an objection filed by the debtor, Ahmad Khazaei ("Debtor"), to the claim of a creditor, Alireza Nikoumanesh ("Nikoumanesh"). For a short time in 2000, the Debtor and Nikoumanesh were partners in a TCBY ice cream store in Ypsilanti, Michigan. The landlord was Squires Plaza. In December, 2000, Nikoumanesh sold his interest in the business to Debtor in exchange for $16,000 and a release from liability. After Nikoumanesh left, the business took a down turn under Debtor's sole direction, and fell behind in the rent. Squires Plaza sued Nikoumanesh and Debtor, as co-lessees, in Washtenaw County Circuit Court. The action was stayed as to Debtor, by operation of 11 U.S.C. § 362, because Debtor had filed a petition for relief under chapter 13 of the Bankruptcy Code. Debtor was later dismissed from the suit. The state court case is still pending in Washtenaw County Circuit Court as to Squires Plaza's claims against Nikoumanesh.

Both Squires Plaza and Nikoumanesh filed claims in this case. The claim of Squires Plaza for $21,250.70 includes unpaid rent, late fees, court costs, and attorney fees and costs. That claim has been allowed and is provided for under Debtor's confirmed chapter 13 plan, which calls for a 12% dividend to general unsecured creditors. After confirmation, Nikoumanesh

filed a claim for $46,000. Nikoumanesh did not include any detail in his proof of claim of the components of the claim, other than a reference, in a narrative "addendum" attached to the claim, to $10,000 in attorney fees. Debtor objected to the claim. Debtor's written objection to Nikoumanesh's claim asserted that Nikoumanesh's claim duplicates Squires Plaza's claim for unpaid rent; the attorney fees paid by Nikoumanesh are unreasonable; Nikoumanesh's claim for rent is capped under § 502(b)(6); and Nikoumanesh's claim should be subordinated under § 509(c) to the claim of Squires Plaza. At the hearing on the objection to claim, Debtor also asserted that any agreement he may have had with Nikoumanesh did not contain an indemnification clause and, therefore, Debtor has no liability to Nikoumanesh for anything other than the rent owed to Squires Plaza. The Court held an evidentiary hearing on Debtor's objection to the claim on April 27, 2005, and took the matter under advisement at the conclusion of the hearing.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following constitutes this Court's findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

For the reasons set forth below, the Court sustains Debtor's objection and disallows Nikoumanesh's claim under § 502(e)(1)(B) because it is a contingent claim for reimbursement, subject to Nikoumanesh's right under §§ 502(e)(2) to have his claim determined and allowed at a later date, if and when it becomes fixed.

II.

Debtor and Nikoumanesh were the only witnesses at the evidentiary hearing. Nikoumanesh testified that he was a partner in the TCBY business for only a short time, by his

estimate only about forty-five days. The business was operated under the name of Cheshmeh, Inc. (Ex. G). When Nikoumanesh left the business, he and Debtor executed a one-page document, with the typed title "BUSINESS PROPERTY LEASE AGREEMENT." (Ex. A.) ("Agreement"). The Agreement lists Squires Plaza as the "LESSOR" and Nikoumanesh and Debtor as "LESSEE." The substantive portion of the Agreement is handwritten, and states as follows:

> Mr. Alireza Nikoumanesh sold all his share [sic] to Cheshmeh Company (to [Debtor]) on Dec. 25 2000 and he has no obligation or liability and no rights (including paying any rent or asking for any profit or using the space at 2610 TCBY). [Debtor] is responsible for paying all the rent.

(Ex. A.)

At the hearing, Debtor acknowledged that he hand wrote the substantive portion of the Agreement, although there was conflicting testimony as to who actually composed the content of the Agreement. Nikoumanesh testified that Debtor wrote the Agreement, with no input from him. On the other hand, Debtor testified that Nikoumanesh dictated the content to him in Persian, and he simply wrote down in English what Nikoumanesh recited.

The parties also disagreed as to the scope of the Agreement, specifically what expenses Nikoumanesh no longer had liability for and what Debtor, in turn, agreed to pay. The Agreement only mentions rent in the sentence describing Debtor's responsibilities. However, the Agreement also uses the phrase "including . . . rent" in the prior sentence limiting Nikoumanesh's future liability, indicating that the parties may have contemplated other expenses. Nikoumanesh testified that he and Debtor discussed what was to be included, and Debtor promised to pay "all those expenses, taxes, attorney fees, everything." Nikoumanesh also stated that the Agreement was "consistent with" what Debtor promised to pay when Nikoumanesh left the business.

On examination by Nikoumanesh's counsel, Debtor stated that his understanding of the Agreement was that he would only be responsible for, and Nikoumanesh would have no liability for, rent and taxes. On examination by his own counsel, Debtor testified that he understood he was responsible only for "rent and maintaining the premises." Neither party entered the lease between them and Squires Plaza into evidence, so the Court is unable to determine precisely what obligations were set forth in the lease.

A second document related to Nikoumanesh leaving the business was also admitted into evidence. Exhibit C is a typed "Receipt," signed by Nikoumanesh and dated December 25, 2000. It reads as follows:

> I, Alireza Nikoumanesh, the undersigned below received the sum of Sixteen Thousand ($16,000.00) Dollars for selling my share in Cheshmeh Corporation, a Michigan Corporation.
>
> The amount was paid via two official checks No. 421919116 @ 12/15/00 for $12,000.00 and check # 421919117 @ 12/15/00 for $3,000.00 drawn on Comerica Bank and $1,000.00 paid cash on the 25th day of December, 2000. The checks and the cash paid by [Debtor].

(Ex. C.) Nikoumanesh testified that the $16,000 paid by Debtor reflected the consideration that Debtor paid Nikoumanesh for Nikoumanesh's interest in the business.

Nikoumanesh testified that Squires Plaza is seeking damages against him in the state court case for back rent, attorney fees, property damage, and missing property. Both parties testified that, as of the time Nikoumanesh left the business, there was no past due rent owing or other past due obligations under the lease with Squires Plaza. Debtor admitted to falling behind in the rent after Nikoumenesh left. Nikoumanesh testified that the total claimed by Squires Plaza in the state court case against him is $36,563.04, but that amount would likely increase as attorney fees were still being incurred by Squires Plaza.

Nikoumanesh also entered into evidence Exhibit D, a three-page document. The first page does not appear to be taken from the same document as pages two and three. Page one is the first page of a pleading in the Washtenaw County Circuit Court case. The pleading consists of Nikoumanesh's "answer," "affirmative defenses," "jury demand," "counter-complaint," and "3rd party claim" against Debtor. Pages two and three are numbered "3" and "4," respectively, and are in a different type face from page one of Exhibit D. The name, address, and telephone number of Manchester & Associates, a law firm in Ypsilanti that represented Squires Plaza, appears printed in the bottom of the left margin of each of those pages. It appears that pages two and three are taken from the complaint filed by that law firm on behalf of Squires Plaza in the state court case. Paragraph 16 lists "base damages" of $19,688.50 requested by "Plaintiffs," apparently meaning Squires Plaza and its principals. Paragraph 14[1] details the amount of "special damages" requested by "Plaintiffs" as follows: late fees of $1,606.08; interest of $1,060.95; attorney fees of $12,350.22; utilities in the amount of $1,261.98; and damage to the premises in the amount of $3,094.59, resulting from the removal of fixtures. The attorney fees are broken down into three components: $10,063.81 for Manchester & Associates; $897.91 for interest at 10%; and $1,388.50 for the Law Offices of James Jackson. Page three of Exhibit D, (numbered "4"), calculates the total damages suffered by "Plaintiffs" as $36,563.04. The figures set forth on Exhibit D correspond with the amount that Nikoumanesh testified was the total claimed by Squires Plaza in the suit against him. In the state court litigation, Nikoumanesh is challenging not only the amount of damages claimed by Squires Plaza, but is also contesting whether he has any liability at all as a co-lessee, arguing that he never signed the lease. There is

[1] There are two paragraphs numbered "14" on the second page of Exhibit D. The "special damages" provision appears in the second paragraph "14."

a jury trial scheduled in the state court case for sometime in November, 2005.

Nikoumanesh was not asked about the details of his claim against Debtor in the bankruptcy case, or even the total amount of his claim. Nikoumanesh did not move for admission of his proof of claim, nor did he move to admit Squires Plaza's proof of claim. However, the Court takes judicial notice of the filing of proofs of claim by Nikoumanesh (Claim #6) and by Squires Plaza (Claim #4), and the filing of Debtor's objection to the claim of Nikoumanesh (Docket Entry #81).[2] In so doing, the Court notes that Nikoumanesh's proof of claim exceeds the amount sought from him by Squires Plaza by approximately $10,000. In addition, the Court notes that Nikoumanesh's claim includes $10,000 in attorney fees incurred in defending himself against Squires Plaza's suit and in prosecuting his claim against Debtor in this case, as well as attorney fees incurred by him in prosecuting an adversary complaint for non-dischargeability, which has been dismissed. Neither witness explained why Squires Plaza's claim against Debtor in this case is only for $21,000 while its claim against Nikoumanesh in state court exceeds $36,000. However, the Court does not need to answer that question, the claim of Squires Plaza having already been allowed in this case. Instead, the issue now before the Court is the allowance or disallowance of Nikoumanesh's claim.

III.

A. Burden of Proof

"A claim or interest, proof of which is filed under section 501 of [Title 11], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Under Fed. R. Bankr. P.

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[2] Fed. R. Bankr. P. 9017 provides that the Federal Rules of Evidence apply to cases under the Bankruptcy Code. A court may take judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

3001(f), "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Debtor does not raise any objection based on the execution and filing of Nikoumanesh's claim. Therefore, the claim is entitled to the evidentiary presumption of validity. However, that presumption is overcome based on Debtor's objections to Nikoumanesh's claim.

> [O]nce the objecting party submits sufficient evidence to place the claimant's entitlement at issue, the burden of going forward with the evidence to sustain the claim shifts to the claimant [ ]. The objecting party is not required to disprove the claim. The burden of persuasion is always on the claimant to establish its entitlement to the claim. . . .

Barry Russell, Bankruptcy Evidence Manual § 301.52 at pp. 750-751 (2003) (citations omitted); see also Kessler v. Jefferson Storage Corp., 125 F.2d 108, 112 (6th Cir. 1941) ("[T]he claimant has the burden of liquidating its claim as a condition precedent to its allowance. Furthermore, the claimant in bankruptcy has the burden of proving its claim."). Accordingly, Nikoumanesh bears the ultimate burden of persuasion.

B. Nikoumanesh's Claim

Nikoumanesh seeks to impose liability on Debtor for all of the amounts that Squires Plaza seeks to recover from Nikoumanesh in the state court litigation, plus Nikoumanesh's own attorney fees. Although not articulated as such in his proof of claim or in his other pleadings, Nikoumanesh is essentially basing his claim against the Debtor upon a right to indemnification. Absent a right to indemnification, then except for a possible claim based upon a common law contribution theory, which Nikoumanesh has not advanced, there is no basis for any claim against the Debtor even if Nikoumanesh is found liable to Squires Plaza in state court.

The Agreement does not contain a governing law provision. "Under Michigan law, '[t]he

validity and construction of a contract are controlled and to be determined by the laws of the Situs, or place where the contract was entered into.'" Wells v. 10-X Manufacturing Co., 609 F.2d 248, 253 (quoting Rubin v. Gallagher, 292 N.W. 584, 586 (Mich. 1940)). Accordingly, the determination of whether Nikoumanesh has a claim against Debtor requires application of Michigan law regarding indemnification and contract interpretation.

> Indemnity relates to the obligation of one person or entity to make good a loss another has incurred while acting for its benefit or at its request. . . . Resting on the equitable principles of a right to restitution and unjust enrichment, the general rule is that a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

Langley v. Harris Corp., 321 N.W.2d 662, 665 (Mich. 1982) (internal quotation marks and citation omitted). "[L]iability should fall upon the party best situated to adopt preventative measures. . . . If one party is without personal fault in the resultant harm, logic dictates that he will not be the best suited to ensure that preventive measures are adopted; hence, he may recover." Minster Machine Co. v. Diamond Stamping Co., 284 N.W.2d 676, 679 (Mich. Ct. App. 1977) (footnotes omitted).

"Michigan courts have recognized three possible sources of a right to indemnity; the common law, an implied contract, and an express contract." Skinner v. D-M-E Corp., 335 N.W.2d 90, 92 (Mich. Ct. App. 1983) (citations omitted). In this case, Nikoumanesh relies upon the Agreement as the source of his right to indemnification. Under Michigan law, indemnification agreements are

> construed in accordance with the rules for the construction of contracts generally. The general rule in the construction of indemnity contracts is to enforce them so as to effectuate the intentions of the parties. Intention is determined by considering not only the language of the contract but also the situation of the

> parties and the circumstances surrounding the contract. Indemnity contracts are construed most strictly against the party who drafts them and against the party who is the indemnitee. . . . [I]n order to be effective, the terms must be unequivocal.

Pritts v. J.I. Case Co., 310 N.W.2d 261, 264 (Mich. Ct. App. 1981) (citations omitted).

There is not much meat on the bones of the contract in this case. However, the Agreement does clearly state that Nikoumanesh would not be responsible for paying rent under the lease, and that Nikoumanesh relinquished all rights to any benefits from the business. The Agreement also contains a promise on the part of Debtor that he would be responsible for paying the rent. Although the parties did not use the word "indemnify," the Agreement does evidence an intent to absolve Nikoumanesh from liability for certain losses caused by Debtor. Both Debtor and Nikoumanesh testified that the business was sound when Nikoumanesh left, with no past due rent. Debtor admitted that he fell behind in the rent only after he bought Nikoumanesh's interest. Debtor was in the best position to prevent any default under the lease. In addition, Debtor acknowledged in his testimony that he intended to indemnify Nikoumanesh, albeit to a limited extent.

The Court finds that Debtor did contract to indemnify Nikoumanesh. The next issue is the extent of the indemnification. The Agreement uses the phrase "including paying of any rent" when referring to Nikoumanesh's release from liability. The use of the word "including" means that the following example, (i.e. paying rent), is illustrative, not exhaustive. The companion sentence addressing Debtor's obligations only refers to the payment of rent, without using the word "including" or specifying other obligations. The two sentences are not mirror provisions, so the Court must look elsewhere to determine the scope of the indemnification that the parties intended in their contract.

The general rule is that extrinsic evidence cannot be considered in interpreting a contract.[3] Michigan courts have articulated the parol evidence rule as follows:

> When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. . . . [T]he test for applying the parol evidence rule is whether the extrinsic evidence seeks to contradict the terms of the written instrument.

Nag Enterprises, Inc. v. All State Industries, Inc., 285 N.W.2d 770, 771 (Mich. 1979) (internal quotation marks and citations omitted). In order to find that a writing contains the "complete" understandings of the parties, "there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." Id. (footnotes and citations omitted). The Agreement between Debtor and Nikoumanesh does not contain an integration clause. (Ex. A.) Further, there is no evidence in the record to show that the parties intended the Agreement to be their complete expression of the matters covered. Therefore, the Court cannot make such finding and instead may look to extrinsic evidence.

The extrinsic evidence in the record in this case consists of a second document and the testimony of Debtor and Nikoumanesh. The second document is the "Receipt." (Ex. C.) The amount and description of the consideration paid by Nikoumanesh to Debtor is contained in that document. Unfortunately, that document sheds no light on the scope of the intended indemnification. The Court looks next to the testimony of the parties. Debtor testified that his promise extended only to rent, taxes, and maintenance of the property. Nikoumanesh, on the

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[3] "Although the parol evidence rule relates to trial procedure, it is substantive in nature" and thus Michigan law applies. CMI-Trading, Inc. v. Quantum Air, Inc., 98 F.3d 887, 891 (6th Cir. 1996), abrogation on other grounds recognized in Morales v. American Honda Motor Co., 151 F.3d 500, 515 (6th Cir. 1998).

other hand, testified that Debtor promised to pay "all those expenses, taxes, attorney fees, everything." Although Nikoumanesh was not directly asked, the inference is that he believed that Debtor promised to indemnify him against all obligations under the lease with Squires Plaza. There is some support for this conclusion because the parties titled the Agreement "BUSINESS PROPERTY LEASE AGREEMENT," with Squires Plaza listed as the "LESSOR" and Nikoumanesh and Debtor as "LESSEE." However, the lease is not in evidence, so the Court is unable to ascertain precisely what "all those expenses" might be.

Michigan law regarding the interpretation of indemnification contracts instructs that the Agreement should be construed against the drafter and the indemnitee. See Pritts v. J.I. Case Co., 310 N.W.2d at 264. The parties both pointed to the other as the drafter. Nikoumanesh testified that Debtor drafted the Agreement, with no input from Nikoumanesh. The difficulty with Nikoumanesh's attempt to shift the responsibility to Debtor is that the indemnification was for Nikoumanesh's benefit and intended to protect him from liability. Nikoumanesh was in the best position to protect his own interests by ensuring that the Agreement accurately reflected his intentions and that the indemnification provision was as clear and broad as possible. Even assuming Debtor drafted the Agreement, it still must be construed against Nikoumanesh as the indemnitee.

After reviewing all of the evidence, the Court finds that the Debtor did agree to indemnify Nikoumanesh in the Agreement, but the scope of Debtor's indemnification of Nikoumanesh in the Agreement is limited to rent, taxes, and maintenance of the property. Although there is some evidence in the record suggesting that Debtor agreed to indemnify Nikoumanesh for attorney fees, after weighing all of the evidence, the Court finds that Nikoumanesh has not met his burden

to prove that Debtor agreed to indemnify Nikoumanesh for attorney fees incurred by Nikoumanesh either in defending the litigation brought against him by Squires Plaza or participating in this bankruptcy case, or incurred by Squires Plaza in the state court case. Therefore, Nikoumanesh is not entitled to a claim for attorney fees, and the Court need not reach the issue of the reasonableness of any claimed fees.

The Court concludes that Nikoumanesh is entitled to be indemnified by Debtor against rent, taxes and maintenance of the property. However, the Debtor has raised several objections to the allowance of a claim for such amounts in favor of Nikoumanesh.

C. Debtor's Objections

1. Disallowance Under Section 502(b)(6)

Debtor's first objection is that the claim of Squires Plaza constitutes the entire amount of rent owed to Squires Plaza under the lease and, therefore, Nikoumanesh's claim should be disallowed under § 502(b)(6). Debtor did not elaborate on this argument, and presented no evidence to show either that Squires Plaza's claim exceeded the cap under § 502(b)(6) or that § 502(b)(6) would apply at all to Nikoumanesh, who was not himself the "lessor." The Court assumes that Debtor has abandoned this argument, and will deny this objection.

2. Subordination Under Section 509(c)

Debtor's next objection is based on § 509(c). Debtor asserts that Nikoumanesh's claim should be subordinated to Squires Plaza's claim because Nikoumanesh is a co-debtor to Squires Plaza. However, subordination under § 509(c) applies only to the claim of a co-debtor who has become subrogated under § 509(a) to the claims of a creditor. Subrogation under § 509(a) requires that the claimant pay a claim on which the debtor is co-liable. Nikoumanesh has not yet

been found liable under the lease with Squires Plaza, much less paid on any claim under that lease. Therefore, Nikoumanesh is not subrogated to Squires Plaza's claim under § 509(a) and subordination under § 509(c) is inapplicable at this time. The Court denies Debtor's request for subordination.

3. Disallowance Under Section 502(e)(1)(B)

Debtor's next objection is that Nikoumanesh's claim duplicates Squires Plaza's claim. According to Squires Plaza's proof of claim filed in this case, it is seeking rent, late fees, court costs, and attorney fees and costs from Debtor. Nikoumanesh's proof of claim appears to contain these same items. However, Nikoumanesh's liability, if any, under the lease with Squires Plaza has been neither established nor liquidated. Therefore, Nikoumanesh's claim is still contingent at this point in time.

Although not cited by either party, there is a Bankruptcy Code section that applies to contingent claims in these circumstances. Section 502(e)(1)(B) of the Bankruptcy Code provides that "the court shall disallow any claim for reimbursement . . . of an entity that is liable with the debtor on . . . to the extent that . . . such claim for reimbursement . . . is contingent as of the time of allowance or disallowance of such claim for reimbursement . . . ." 11 U.S.C. § 502(e)(1)(B).[4] This provision "is not intended to immunize debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts." Norpak v. Eagle-Picher Industries,

[4] The Bankruptcy Code does not require the Court to disallow all contingent claims. Section 502(c)(1) permits the Court to estimate contingent claims for purpose of allowance where necessary to avoid unduly delaying the administration of the case. However, where the contingent claim is for reimbursement or contribution by an entity that is liable with the debtor to a creditor, the specific direction of § 502(e)(1)(B) requires the Bankruptcy Court to disallow such contingent claim. See United States v. Perry, 360 F.3d 519, 535 (6th Cir. 2004) ("One of the most basic canons of statutory construction is that a more specific provision takes precedence over a more general one.") (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989)).

Inc. (In re Eagle-Picher Industries, Inc.), 131 F.3d 1185, 1187 (6th Cir. 1997) (internal quotation marks and citation omitted). Section 502(e)(1)

> reflects two Congressional policies. First, it allows for the expeditious resolution of issues so as not to burden the estate by claims which have not come to fruition. Second, it prevents competition between a creditor and his guarantor for the limited proceeds of the estate. Therefore, it seeks to preclude redundant recoveries on identical claims, or "double dipping."

In re Lull Corp., 162 B.R. 234, 235 (Bankr. D. Minn. 1993) (internal quotation marks and citations omitted).

The U.S. Court of Appeals for the Sixth Circuit uses a three-part test in applying § 502(e)(1)(B).

> In order for a claim to be disallowed under § 502(e)(1)(B), [ ] the debtor must show the following three elements: (1) the claim is for reimbursement or contribution; (2) the claim is asserted by an entity co-liable with the debtor on a primary creditor's claim; and (3) the claim is contingent as of the time of disallowance.

Norpak v. Eagle-Picher, 131 F.3d at 1187-88 (citation omitted).

Applying the first of these three factors, Nikoumanesh's claim for indemnity is a claim for reimbursement. Capitol Industries, Inc. v. Regal Cinemas, Inc. (In re Regal Cinemas, Inc.), 393 F.3d 647, 650 (6th Cir. 2994) ("As a threshold matter, Capitol's indemnification claim amounts to a claim for reimbursement. Analytically, indemnity is the same as reimbursement.") (internal quotation marks and citation omitted).

Next, "[c]ourts have held that the phrase 'an entity that is liable with the debtor' is broad enough to encompass any type of liability shared with the debtor, *whatever its basis*." Norpak v. Eagle-Picher, 131 F.3d at 1190 (emphasis in original) (internal quotation marks and citation omitted). In this case, Squires Plaza is the primary creditor. The state court suit by Squires Plaza

against Nikoumanesh is based on his alleged co-liability with Debtor under the lease. That alleged co-liability satisfies the second element under Norpak v. Eagle-Picher.

Finally, the third element under the Sixth Circuit test is that "the claim is contingent as of the time of disallowance." This encompasses two prongs. First, the claim must be contingent. "In the ordinary course of events, one is not obligated to indemnify or pay damages to another until one's liability for the injury has been established." Gelman Sciences, Inc. v. Fireman's Fund Insurance Co., 455 N.W.2d 328, 330 (Mich. Ct. App. 1990). "An action for indemnification does not accrue until liability is legally imposed." Beck v. Westphal, 366 N.W.2d 217, 221 (Mich. Ct. App. 1895). Because the state court case against Nikoumanesh is still pending and there has been no judgment entered against him finding him liable under the lease, his claim against the estate is contingent. See Windolph Trust v. Leitch (In re Kent Holland Die Casting & Plating, Inc.), 125 B.R. 493, 501 (Bankr. W.D. Mich. 1991) (finding that, because an environmental law suit was still pending, the lessor's claim against the debtor was contingent). In this case, Nikoumanesh's claim is contingent both as to liability and payment. The second part of the final element is that the claim must be contingent as of the time of disallowance. The "time of allowance or disallowance" is the date of the bankruptcy court's ruling on the allowance or disallowance of a claim. In re Lull Corp., 162 BR 234, 238-39 (Bankr. D. Minn. 1993). As this is the matter presently before the Court, now is the time for allowance or disallowance. The Court concludes that Nikoumanesh's claim is (1) a claim for reimbursement; (2) asserted by an entity that is co-liable with Debtor on Squires Plaza's claim; and (3) contingent as of the time for allowance or disallowance. Therefore, the claim falls under § 502(e)(1)(B) and must, at least for the time being, be disallowed.

However, Nikoumanesh still has recourse. Once a contingent claim becomes fixed, under § 502(e)(2), it shall be determined and allowed. "A claim for reimbursement . . . of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed . . . the same as if such claim had become fixed before the date of the filing of the petition." 11 U.S.C. § 502(e)(2). "Section 502(e)(2) mitigates the effects of § 502(e)(1)(B) by allowing a co-liable party to 'fix' its contingent claim by satisfying the debt due to the creditor. This then leaves the co-liable party as the sole holder of the claim against the estate." In re Lull Corp., 162 B.R. 234, 238 (Bankr. D. Minn. 1993) (citation omitted). If Nikoumanesh prevails in the state court case, he will not be entitled to an allowed claim in this case. On the other hand, if he is unsuccessful, and is found to be liable to Squires Plaza for any rent, taxes or maintenance expenses for the property, he may then request that he be allowed a claim for such amounts in this bankruptcy case based upon Debtor's agreement to indemnify him against such liabilities.

One final point bears mentioning. Nikoumanesh repeatedly argued at the hearing and in his pleadings that disallowance of his claim would be "unfair" and "absurd" because Nikoumanesh is "innocent" and Debtor is the real "culprit" whose "sins" have created this problem. Nikoumanesh's frustration at his predicament is understandable. However, there is no evidence in the record that Debtor intentionally ruined the business, or otherwise engaged in any fraud or misconduct. Instead, the evidence showed that Debtor's business simply failed and Debtor was not able to pay all of his debts. As a result, Debtor filed a petition for relief under Chapter 13 and has confirmed a Chapter 13 plan. There is nothing in the record to warrant any moral aspersions, nor are they helpful to the application of the law in this case. Section 502(e)(1)(B) requires disallowance of Nikoumanesh's claim on the facts of this case without

regard to Nikoumanesh's perception of Debtor's moral culpability.

In conclusion, Debtor's objection to the claim of Nikoumanesh is SUSTAINED, and Nikoumanesh's claim is disallowed, subject to Nikoumanesh's right under § 502(e)(2) to have his claim determined and allowed at a later date, if and when it becomes fixed. The Court will enter an order consistent with this opinion.

Phillip J. Shefferly
United States Bankruptcy Judge

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